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LEGAL STATUS OF A LODGER.

Where permission is given to do something upon or make use of the land or premises of another, but without any right of exclusive possession or occupation, the relation thereby created is one of licensor and licensee. A license "passeth no interest, nor alters or transfers property or anything, but only makes an action lawful which, without it, had been unlawful" (*Thomas v. Sorrel, Vaughan* 351; *Wiseman v. Lucksinger*, 84 N. Y. 31).

In order to create the conventional relation of landlord and tenant it is necessary that the right to the exclusive possession of the premises in question be granted to the so-called tenant; but, as the Appellate Division in the First Department said in the case of *United Merchants Realty & Improvement Co. v. N. Y. Hippodrome* (133 App. Div. 582, 118 N. Y. Supp. 128, at p. 130): "The fact that the parties used the words 'let' and 'landlord' is not conclusive."

Accordingly, it was held in that case that an agreement whereby the owner of certain premises let to the defendant all of the roof of those premises for a term of two years, to be used solely for the purpose of erecting thereon a bulletin board, at a yearly rental of \$2,000, was not a lease of real property, since the owner did not give to defendant in that case the exclusive possession of the roof. The relationship created was held to be that of licensor and licensee (see also *United Merchants Realty & Improvement Co. v. American Bill Posting Co.*, 128 N. Y. Supp. 666).

The question of whether or not in a given case the exclusive right to possession of certain premises or a part thereof has been granted has arisen often; for example, in connection with tickets of admission to a place of amusement (*Wood v. Leadbitter*, 13 M. & W. 838) and the hiring of a dance hall for specified days (*Johnson v. Wilkinson*, 139 Mass. 3). In those cases the relationship has been held to be one of licensor and licensee.

It often happens, however, that it is difficult to determine whether or not the exclusive possession of the premises has been granted. An important and frequently occurring example of this

Ordinarily an agreement for board and lodging is not a hiring or letting of real estate and does not give rise to the relationship of landlord and tenant, but creates contractual obligations and rights only.

As Bronson, J., stated in his opinion in the leading case of *Wilson v. Martin* (1 Denio, N. Y. 602, at p. 604), where the facts were that the defendant had agreed by parol with plaintiff, a boarding house keeper, for rooms and board for himself and family for one year at a certain amount per week for rooms and a certain amount per week for board:

"Again, this was nothing more than an agreement for board and lodging, with a designation of the particular rooms which the defendant was to occupy. It was not a contract for the hiring and letting of real estate. When one contracts with the keeper of a hotel or boarding house for rooms and board, whether for a week or a year, the technical relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the real estate. If he is turned out of the rooms before the time expires he cannot maintain ejectment, and while he remains the hotelkeeper cannot get his pay by distraining as for rent in arrears. I repeat: There was nothing more than a contract for board and lodging."

In the leading case of *White v. Maynard* (111 Mass. 250) the action was by the keeper of a boarding house against a lodger for breach of an oral contract, by which the plaintiff agreed to provide the defendant and his family of four persons with board and with three specified rooms as lodgings in her house, and to light and heat such rooms, from November 26, 1866, to May 1, 1867, at the weekly rate of \$75, and the defendant agreed to board and lodge with the plaintiff accordingly.

The defendant at the trial contended that this agreement was for an interest in or concerning lands within the Statute of Frauds and created no more than an estate at will.

The court delivered an exhaustive opinion reviewing the English authorities, and holding that the agreement was not for any interest in lands. The court said (at pp. 253-4):

"In *Fludier v. Lombe* (Cas. temp. Hardw. 307) Lord Hardwicke held that a man who let rooms to lodgers was still the

considered by any one as an occupier of an house. It is not the common understanding of the word; neither the house, nor even any part of it, can be properly said to be in the tenure or occupation of the lodger.' And this definition was cited with approval by Chief Justice Erle in *Cook v. Humber* (11 C. B., N. S. 33, 46). So in *Brewer v. McGown* (L. R. 5, C. P. 239) it was held that the owner or tenant of a dwelling-house was not a joint occupier with a lodger to whom he let the exclusive use of a bedroom and the joint use of a sitting room; and Mr. Justice Wiles, after observing that the lodger 'clearly was not a joint occupier of the room in which he took his meals,' added: 'And with respect to the bedroom, he clearly had not an occupation as owner or tenant, but only an occupation as lodger.'

"In like manner, under the English valuation and tax acts, it has been held that, in order to constitute a tenancy, there must be a putting of a lessee into the exclusive occupation of the apartment, and not a mere admission of a common lodger or inmate, the landlord retaining the legal possession of the whole house (*Smith v. St. Michael*, 3 E. & E. 383; *Stamper v. Overseers of Sunderland*, L. R. 3, C. P. 388; *The Queen v. St. George's Union*, L. R. 7, Q. B. 90).

"It was decided by Lord Ellenborough, and admitted by Barons Parke and Alderson, that a covenant, in a lease of a coffee-house in London, not to lease or underlet the premises or any part thereof, was not broken by permitting a man to lodge for a year in a particular room, 'of which he had exclusive possession,' unless under a distinct demise of the room so as to enable him to maintain trespass (*Doe v. Laming*, 4 Camp. 73; *Greenslade v. Tapscott*, 1 C., M. & R. 55; S. C., 4 Tyrwh. 566).

"An entire floor, or a series of rooms or even a single room, may doubtless be let for lodgings, so separated from the rest of the house as to become in fact and in law the separate tenement of the lessee (*Newman v. Anderton*, 2 B. & P., N. R. 224; *Fenn v. Grafton*, 2 Bing. N. C. 617; S. C., 3 Scott 56; *Monks v. Dykes*, 4 M. and W. 567; *Swain v. Mizner*, 8 Gray 182). But in such a case, as observed by this court in *Swain v. Mizner* he is 'a housekeeper, and not a lodger only.' In *Monks v. Dykes* it was held that a lodger, occupying one room in a house, the woman who owned the house residing therein and keeping the key of the outer door, had no such occupation of the room that he could maintain trespass against a stranger intruding into the room, and Baron Parke said: 'I think that neither in law nor in common sense can a man be described as being in possession of a dwelling house when he is a mere lodger.' "

In the case of *Fox v. Windermere Hotel Apt. Co.* (30 Cal. App. 162), apartments were rented out to plaintiff by defendant, completely furnished, the defendant retaining keys to all the apartments and having access to them to keep them in order, furnish linen, light and heat, etc. The court said that the plaintiff had made no attempt to distinguish the case from the ordinary lodging house cases by showing that the building was divided into separate apartments intended as homes or residences of families living independently of each other, and in each of which there was a separate kitchen and bathroom. The court said:

"A lodging house is none the less so because it contains furnished apartments that are let week by week or month (*Cromwell v. Stephens*, 2 Daly, N. Y. 15). Where, as here, the testimony shows that the house was under the direct control and supervision of the owners, that the rooms were furnished and attended to by them, and that they or their servants retained the keys thereto, a person renting such a room makes himself a lodger and not a tenant" (citing many cases).

Although, therefore, the ordinary agreement for board and lodging does not create the relation of landlord and tenant, yet an entire floor, or a series of rooms, or even a single room, under exceptional circumstances may be let for lodgings so separated from the rest of the house as to become a separate tenement of the lessee (*Swain v. Mizner*, 8 Gray, Mass. 182).

Nor does the fact that board is to be furnished necessarily prevent the relationship from being that of landlord and tenant.

In the case of *Oliver v. Moore* (53 Hun 472, 6 N. Y. Supp. 413) the plaintiff had, by agreement under seal, let certain specified rooms for a term of eight and a half months at a weekly rental of \$75. There were covenants by the "lessee" to pay the rent, not to sublet, etc., and a covenant by plaintiff, "landlord," to board or furnish suitable food for the "lessee" and her maid for the whole term without additional expense.

The court held that the agreement constituted a lease and created a landlord and tenant relationship, distinguishing the cases of *Wilson v. Martin* and *White v. Maynard* (*supra*), on the ground that the agreement gave the "lessee" the exclusive

possession of the rooms specified therein and gave her "different rights from those belonging to the ordinary boarders and lodgers." The form of the agreement (it was *under seal*) seemed to be a factor in leading the court to construe the agreement as a lease. The court said at p. 415 "that it was the purpose of the parties to the contract now under consideration to create a tenancy on the part of Miss Gross and not simply to enter into an ordinary agreement for board and lodging seems evident from the very form of the instrument which they adopted to express their intent. In *Wilson v. Martin*, already cited, the agreement was oral, and, being merely for board and lodging, with a designation of the particular rooms to be occupied, it was held not to create the relation of landlord and tenant between the parties. It differed materially from this contract, which is a demise in writing of certain premises for a definite term and for a special sum embracing the entire term. Here the undertaking to board the lessee is collateral to the principal agreement, as was the case in *Shallies v. Wilcox* (2 Hun 419), where a similar undertaking was likened to 'a covenant for repairs or other collateral covenant in a lease running with it and part of the contract.'"

The case of *Porter v. Merrill* (124 Mass. 534) is another case where the relationship was held to be that of landlord and tenant; the lease in that case was written, applied to specific rooms separated from the others in the house, and gave the lessee the option to take meals in the restaurant in the building or elsewhere.

The rule is stated in *McAdam on Landlord and Tenant* (4th ed., p. 128) that "while an agreement for rooms and board does not create the relation of landlord and tenant, the hiring of rooms, where board is but an incident, may create it."

And again, at page 132, it is stated:

"Where rooms are let as the principal subject matter and the board is merely an incident of the hiring the relation of landlord and tenant may be created."

This distinction seems to be based upon the statement in the opinion of the court in the case of *Oliver v. Moore* (53 Hun 472, 6 N. Y. Supp. 413), and on the case therein cited of *S. Shallies v. Wilcox* (2 Hun 419).

In the case of *Ashton v. Margolies* (129 N. Y. Supp. 617) the question was raised whether an agreement for a suite of four rooms with bath for defendant and his family at a weekly rental of \$170, inclusive of board, constituted a lease, but the court found it unnecessary to decide the question. It did say, however, by way of *dictum*, at p. 619: "While it is true, as contended by the respondent, that an agreement for the letting of an apartment in an apartment hotel ordinarily creates the relationship of landlord and tenant between the parties, and while it is also evident that the ordinary relationship between the inn-keeper and his guest did not exist between these parties, because of the surrender by the plaintiff of the custody and control of the apartment in question to the defendant, it is equally true that the contract in question here is not analogous to an ordinary lease of premises. The plaintiff did not lease the apartment for a stipulated rental of \$70 per week, with a collateral agreement to furnish board to defendant and his family, but it is expressly stipulated in the contract that the consideration for which the \$70 per week was to be paid was '*inclusive of board for your wife, yourself, baby and nurse.*' The furnishing of the board, therefore, was not merely incidental to the renting of the premises, but was in fact a very substantial, if not the most substantial, part of the contract."—*New York Law Journal*.